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AUG - 3 1993

BEFORE THE

Federal Communications Commission

In the Matter of	)	
	)	
Implementation of Sections of the	)	
Cable Television Consumer Protection	)	
and Competition Act of 1992	)	MM Docket 92-266
	)	
Rate Regulation	)	
	)	
To: The Commission	)	

REPLY TO OPPOSITIONS TO THE PETITION FOR RECONSIDERATION OF SUR CORPORATION

SUR Corporation (herein "SUR") herewith submits its Reply to certain of the oppositions to the Petition For Reconsideration filed by SUR on June 21, 1993 regarding the leased access provisions of the Report and Order in this proceeding released May 3, 1993 (FCC 93-177). SUR's reply is intended only to respond to a limited number of the oppositions which take issue with SUR's reading of the applicable provisions of the commercial leased access provisions of the 1992 Cable Act.[1]

Initially SUR wishes to stress what it views as the indisputable primary purpose of the commercial leased access provisions of the 1992 Cable Act: namely, to introduce a measure of competition and diversity into the provision of cable services to the American public and to remove from the cable operators the degree of monopolistic control, both in terms of the product and the cost to the consumer, of diverse offerings of video programming. Those purposes find expression in the amended commercial leased access provisions of the statute. The system oppositions which have been filed in this proceeding are premised on the assumption that the purpose of the 1992 Act was to preserve the ability of cable operators to maximize profits, to avoid

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[1] Oppositions to Petitions for Reconsideration of Cablevision Industries Corporation, et al.; Continental Cablevision, Inc.; Time Warner Entertainment Company, L.P.; and

allowing their systems to be the outlet for competitive program product in which they may have an ownership interest, and to deny that increased diversity in the provision of video programming was a key goal of Congress. Unfortunately, it is the very unreasoning opposition to reasonable access for minority programming that demonstrates the need for more detailed FCC involvement in the rates, terms and conditions of commercial leased access.

As described in greater detail in SUR's Petition for Reconsideration, it is the provider of a distinctly unique minority programming service not otherwise available to Hispanic residents of the United States who are interested in the news, public affairs, and entertainment available from Latin American countries to which they may have particular ties. SUR believes that its cable service is precisely the kind of unique programming that Congress intended to cover by the amendments to the leased commercial access provisions of the Communications Act.

The issues in this proceeding, however, illustrate the validity of the maxim that lofty goals are one thing, achieving them is quite another, and the devil is in the details. In this case those details are the means by which access to systems by minority programmers can be obtained, the cost that will be imposed upon them, and the manner in which the exercise of discretion by system operators to set rates and choose leased access tenants is

structure of the 1992 Act are not out of this world.

One needs to emphasize what was thought to be understood by all of the sophisticated cable operators that have opposed SUR's Petition For Reconsideration, namely that the former provisions of the 1984 Cable Act which provided for commercial leased access have been a disappointing failure. As emphasized by the House Report on HR 4850 at pages 39 and 122:

> The Committee believes that leased access has not been an effective mechanism for securing access for programmers to the cable infrastructure or to cable subscribers. In

> programming sources also would contribute greatly to the diversity of programming available to cable viewers and will help to assure the widest possible diversity of information services to the public. New subsection 612(i) is intended to provide cable operators increased incentives to carry minority programming services and is consistent with FCC and Congressional objectives to increase the diversity of viewpoints by encouraging minority ownership of the communications media. The constitutionality of regulatory and legislative initiatives intended to increase minority ownership of and participation in the media recently was upheld by the United States Supreme Court. Metro Broadcasting, Inc. v. FCC, 58 U.S.L.W. 5053, 111 L.Ed. 2d 445 (1990).

Thus, the 1992 Act sought to open up systems to minority programming and to remedy system control of access by adding to the purpose of Section 612 (47 U.S.C. Section 532(a)) the words "to promote competition in the delivery of diverse sources of video programming"; by requiring cable operators in Section 612(c)(1) to "establish, consistent with the purpose of this section, and with rules prescribed by the Commission under paragraph (4), the price, terms, and conditions of such use which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system."

However, the reference in that provision to conditions of use which would not adversely affect the operation financial condition or market development of the cable system are modified by the reference to the rules prescribed by the Commission in paragraph (4) of Section 532(c). Section (4) of 532(c) for the first time

imports into the statute FCC authority: (1) to determine the maximum reasonable rates that a cable operator may establish; (2) to establish reasonable terms and conditions for such use, including those for billing and collection; and (3) establish procedures for the expedited resolution of disputes concerning rates or carriage.

These new provisions were intended to transform and revitalize the leased access provisions of the 1984 Cable Act. Notwithstanding that these explicit changes in the statute were designed to carry out revisions that would make leased access a real alternative for minority and diverse sources of competitive programming on cable systems, the oppositions to SUR's Petition attempt to convince the Commission that nothing has changed, that systems may maximize rates without regard to how such rates may impact the purpose of encouraging diverse offerings, that rates and terms of use will not impact upon the ability of minority programmers to reach a new audience, and that minority programmers must be prepared to pay the same rates that commercial entertainment mass audience video programmers pay for access on a contract basis to cable systems.

TWE's discussion of the implied fee model illustrates, rather than refutes, SUR's discussion of the methodology the Commission should impose on system operators to achieve the purposes of the legislation. TWE urges that a leased access programmer should pay a maximum fee keyed to the number of system subscribers and without regard to the number of subscribers that may choose to utilize the

new leased access channel. TWE Opposition, p. 33-34. Claiming that only this methodology would comport with Congress' mandate that the price, terms and conditions for use of leased access channels not "adversely affect the operation, financial condition or market development" of cable system, TWE completely ignores the statutory requirement that the rates first must be "reasonable."[2]

Under TWE's analysis, if SUR were the only program supplier to request a leased access channel and 25% of TWE's subscribers were Hispanic (5,000 homes, 1/4 of 20,000), SUR could be denied access unless it paid $30,000 a month or $6 (six) for each of its potential subscribers. Showtime would, of course, be paying only $1.50 per subscriber under the FCC's implicit fee model.

Nonetheless, TWE, with no other leased access demand competitive with SUR, and with no possible adverse consequence to the financial condition of its system by making access available for less than $6 a subscriber, and with no benefit of a new diverse program offering, would retain gatekeeper discretion to insist on plainly unreasonable price, terms and conditions of use.[3]

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[2] It is commonplace in the commercial space leasing community that rents in shopping malls and other similar areas open to the public are keyed to public traffic patterns and/or gross sales. Mall operators, if not CATV systems, do not seem to have difficulty in understanding that rent charged to a shoe repair shop cannot be based on the rent charged to a Nieman Marcus.

[3] The claim of Bend Cable Communications et al. (Opposit. p. 5) and similar rhetoric of Cablevision Industries, et al. opposition (p. 18-19) that "Congress modified the leased access

Retention of the implicit fee model without modification to prevent such a result would return leased access to the dead letter status of the failed 1984 Cable Act provisions.

Of course, the above example merely illustrates that the Commission's task is to further refine the general parameters of what may be "reasonable", not to suggest that it is possible to anticipate in detail appropriate rates, terms and conditions of use for every CATV system. The need for more particularization is absolutely essential to avoid embroiling system operators, programmers, and the FCC in administrative complaint procedures with respect to every access request. While the availability of ad hoc access to the FCC is crucial, resolution of leased access complaints will be more efficiently handled by the adoption of

Moreover, the need to require system operators to measure and respond to categories of diversity enhancing programmers is illustrated by the very experience of ParCable, Inc. cited in its Opposition (p. 3-4). Using rates pegged to what it describes as an implicit fee model, its resort cable system drew four programmers who had no difficulty paying access fees thus set by the system operator. However, the programming services were strictly commercial and largely duplicative of one another. While ParCable's claimed "experience underscores the commercial reality that charges which recognize the value of cable channels are not an obstacle to programmers with realistic expectations, viable business plans, adequate financing and good management", that experience says nothing about how diversity of programming was thus enhanced on the system or how many equally well managed and financed minority programmers (like SUR) may have been deterred from seeking access on the system.

In sum, the standards adopted by the Commission for defining reasonable rates and other terms should be designed to facilitate and encourage, rather than obstruct and discourage, access by minority programmers such as SUR. The approach advanced by SUR in its Petition for Reconsideration would advance this Congressional objective.

Respectfully submitted

SUR CORPORATION

By 
J. Bruce Irving

Bailey, Hunt, Jones & Busto
Courvoisier Centre, Suite 300
501 Brickell Key Drive
Miami, FL 33131-2623
(305) 374-5505
Its Counsel

CERTIFICATE OF SERVICE

I, Sandra Sachs, do hereby certify that a copy of the foregoing "Reply to the Oppositions to the Petition for Reconsideration of SUR Corporation" was sent by first-class mail, postage prepaid, this 3rd day of August, 1993, to the following:

Dow, Lohnes & Albertson
1255 Twenty-Third Street, N.W.
Suite 500
Washington, D.C. 20037
Counsel for Cablevision Industries Corporation
Comcast Corporation
Cox Cable Communications,
a division of Cox Communications, Inc.
First Carolina Communications, Inc.
Jones Intercable, Inc.
Mid-Coast Cable Television, Inc.
Service Electric Cablevision, Inc.
Vista Communications, Inc.

Cole, Raywid & Braverman
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
Counsel for Continental Cablevision, Inc.

Willkie Farr & Gallagher
1155 21st St., N.W.
Suite 600
Washington, D.C. 20036
Counsel for Time Warner Entertainment Company, L.P.

Fleischman and Walsh
1400 16th Street, N.W.
Washington, D.C. 20036
Counsel for Time Warner Entertainment Company, L.P.

Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
Counsel for Bend Cable Communications, Inc.
Blade Communications, Inc.
Multimedia Cablevision, Inc.
Multivision Cable TV Corp.
Parcable, Inc.
Providence Journal Company
River Valley Cable TV
Sammons Communications, Inc.

Sandra Sachs

Sandra Sachs